

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD RAYMOND BELL,

Defendant-Appellant.

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UNPUBLISHED

February 13, 1998

No. 194782

Calhoun Circuit Court

LC No. 95-002480 FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant was charged with open murder in the shooting death of Michael Gray. Following a jury trial, he was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively to a twenty-five-to fifty-year term for the murder conviction. Defendant appeals as of right. We reverse and remand for a new trial.

This case arises out of a dispute between two groups of people in their teens and early twenties, one led by Anthony McNichols and the other led by Jamie Lepird. Trial testimony established that late on July 4 or early on July 5, 1995, McNichols, Gray, and two others showed up at a gathering at defendant's sister's house attended by defendant and several other friends of Lepird, including Tom Howard. All had apparently spent the day drinking and celebrating the holiday. A fight broke out between McNichols and Howard. After Howard came at McNichols with a broken bottle, Gray tossed a knife to McNichols. The fight ended with Howard bleeding heavily. Fearing someone might have called the police, McNichols and his companions left and started walking toward Gray's house. At some point, McNichols returned the knife to Gray.

Lepird was angry about what McNichols had done to Howard. Consequently, he, defendant, and up to twenty others went to find McNichols. They eventually found McNichols and Gray near Gray's house. Lepird confronted McNichols and began taunting him. The two wrestled for approximately five minutes as several people watched and yelled. When McNichols stopped fighting,

Lepird continued to taunt him, and defendant joined in. McNichols then announced that Gray would fight defendant. Words were exchanged between defendant and Gray. Gray approached defendant, threw down his hat, and said “I’m going to get you” or “you’re going to die.” Defendant pulled a gun from his waist and shot Gray in the neck.

Defendant contends that the trial court committed error requiring reversal by submitting to the jury a first-degree murder charge that the evidence did not support. We agree that there was insufficient evidence of premeditation and deliberation to justify submission of the first-degree murder charge. We disagree, however, that the error compromised the jury, as defendant claims. Nevertheless, we are compelled to reverse under *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975). See *People v Graves*, 224 Mich App 676; 569 NW2d 911 (1997).

When reviewing the denial of a motion for directed verdict, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). To constitute first-degree murder, it must be established that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Although the length of time needed to measure and evaluate a choice before it is made is incapable of precise determination, there must be some interval in which a second look can be contemplated. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). The following factors are relevant to finding premeditation and deliberation: (1) the prior relationship of the parties; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

In this case, there was no evidence of any dispute or even any exchange between defendant and Gray until moments before the shooting. One witness testified that he attempted to stop Gray from attacking defendant because Gray and defendant were friends. Two days after the shooting, in an interview with the police, defendant also recounted that in the moments before the shooting, McNichols taunted him and said Gray would “whip my ass.... Ya know, I just said, ‘Mikey [Gray], ain’t gonna do nothing, Mikey’s my friend.’” It appears that the real dispute in this case was between McNichols and Lepird; there were no facts presented regarding the prior relationship of defendant and Gray from which a deliberated and premeditated killing could reasonably be inferred.

Although defendant was carrying a gun when he left the gathering at his sister’s house, there was no evidence that defendant planned to kill Gray or anyone else that night. In *People v Gill*, 43 Mich App 598, 604; 204 NW2d 699 (1972), this Court stated that the defendant’s “delay in producing a weapon until he found himself losing the fight suggests that he did not intend in all events to use the weapon he apparently was carrying on his person -- that his purpose at the outset of the fight was not to kill [the victim].” Likewise, in this case, no witnesses testified that they saw defendant with a gun before the shooting. Rather, testimony indicated that defendant was not known to carry, or even own, a gun. Defendant stated that he had purchased the gun the day of the shooting for protection because he had been threatened by someone other than Gray, and that the gun was in his pocket when Gray

approached him. Like the defendant in *Gill*, the evidence fails to suggest that defendant's purpose in carrying the gun was to kill Gray, and premeditation could not reasonably be inferred from the mere fact that defendant was carrying a gun.

Defendant stated that after he shot Gray he ran home, throwing the gun into a dumpster along the way. No evidence to the contrary was presented at trial. Such conduct is inconsistent with a planned killing. *People v Morrin*, 31 Mich App 301, 309-310, 332; 187 NW2d 434 (1971). Therefore, premeditation could not reasonably be inferred from defendant's conduct after the killing.

Based on the evidence presented at trial, and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not conclude that defendant took time to reflect or take a second look before shooting Gray. Possession of a deadly weapon in advance of the slaying is the only fact from which premeditation and deliberation can reasonably be inferred on this record. In the absence of other circumstances showing a motive, plan, or reflection that would enable a trier of fact to infer that the killing was not a spur-of-the-moment decision, however, possession of the gun is insufficient. See *People v Waters*, 118 Mich App 176, 186-187; 324 NW2d 564 (1982), *People v Livingston*, 63 Mich App 129, 133; 234 NW2d 176 (1975), *Morrin*, *supra*, p 333. It is difficult to infer from this record that defendant even considered fighting Gray until Gray's friend, McNichols, suggested it moments before the shooting. The trial court should not have submitted the case to the jury on a charge of first-degree murder.

Because the jury was permitted to consider a charge unwarranted by the proofs, we must reverse and remand for a new trial on the charge of second-degree murder. *Vail*, *supra*. Like the panel in *Graves*, *supra*, however, were we not bound by *Vail*, we would reject its position and affirm defendant's second-degree murder conviction. For the reasons stated in *Graves*, we urge the Court to reconsider its *Vail* decision.

Defendant's remaining arguments require little discussion. First, the claim that the prosecutor improperly elicited testimony from several witnesses that, although not a gang member, defendant associated with members of a gang named "187" after the California penal code number for murder, is not preserved. While we agree that the testimony concerning defendant's association with members of the 187 gang and the meaning of the 187 name was not particularly relevant, the questioning did not deprive defendant of a fair trial, which is the test for prosecutorial misconduct. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

Finally, under the circumstances of this case, the trial court did not abuse its discretion in denying defendant's request for funds to hire an investigator. *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984). The denial of funds did not substantially prejudice defendant at trial. *Mason v Arizona*, 504 F2d 1345, 1352 (CA 9, 1974).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ Barbara B. MacKenzie  
/s/ Hilda R. Gage